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No. 89—

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATHAN WECHSLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit erred by holding (in conflict with seven other Courts of Appeals) that the Travel Act, 18 U.S.C. § 1952, confers federal jurisdiction over a local offense where the only interstate act alleged as a jurisdictional predicate has merely an incidental or minimal connection to the unlawful activity charged.

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NATHAN WECHSLER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nathan Wechsler petitions that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 13, 1989.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit is attached as Appendix A. The unreported order of the United States District Court for the Eastern District of Virginia, dated May 6, 1988, and the transcript referenced in that order are attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1989. Jurisdiction to review that judgment by writ of *certiorari* exists pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute principally involved in the opinion of the United States Court of Appeals and this petition is the Travel Act, 18 U.S.C. § 1952, which provides in relevant part:

> Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

18 U.S.C. § 1952(a). The full text of the statute is reproduced in Appendix C.

STATEMENT OF THE CASE

Nathan Wechsler was convicted in 1967 of conspiring to violate the Travel Act, 18 U.S.C. § 1952. Federal jurisdiction over a one-time, local, zoning scheme involving an improper payment was based solely on the fortuity that two days after the Travel Act was enacted the secretary of a Virginia public official decided to deposit a $1,000 check drawn on a Virginia bank in a District of Columbia bank account. No other use of a facility in interstate commerce was alleged or proven.

The events giving rise to Mr. Wechsler's conviction arose in 1960, when Mr. Wechsler and his three partners, Sigmund Goldblatt, George Faigan and Seymour Faigan (the "partners"), owned 84.3 acres of land in Fairfax County, Virginia they wanted to use as a trailer park.[1]

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[1] Mr. Wechsler accepts for purposes of this petition the facts recited by the Fourth Circuit in Mr. Wechsler's direct appeal, *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*,

In March 1960, George Faigan applied to have the land rezoned from residential to mobile homes. Thereafter, a $5,500 check was placed in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County for contingent fees. Payment was conditioned on favorable action by the Board of Supervisors on the rezoning application.

Two months later, on July 26, 1961, the Board approved the requested rezoning on the affirmative votes of Supervisors Clairborne Leigh, Robert Cotten, Stuart DeBell and another. On August 7, 1961, the partners instructed the Security Bank to release the $5,500 check to Mr. Somers, who deposited it to his account on August 18. At Supervisor Leigh's instruction, Mr. Somers made out a $5,500 check from his account payable to Mr. Leigh.

On August 19, 1961, Mr. Leigh deposited the check to his account; on August 22, he wrote a check for $1,308.33 to Mr. DeBell; on August 23, he wrote a check for $1,333 to himself; and on September 9, he wrote a check for $1,000 to Mr. Cotten. On September 13, Congress enacted the Travel Act. Two days later, on September 15, Mr. Cotten's secretary entered Mr. Cotten's $1,000 check as a legal fee in Mr. Cotten's checkbook and receipts book and deposited the check in Mr. Cotten's District of Columbia bank account. This $1,000 check was sent by mail from the District of Columbia to the Virginia bank upon which it was drawn.

Because the Virginia state courts set aside the original Board action, the partners filed a new rezoning application on June 20, 1962. The Board approved the second

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392 U.S. 932 (1968). While Mr. Wechsler has always maintained that he never committed or conspired to commit any crime and understood the payment to Attorney Somers to be entirely appropriate, he recognizes that he may not retry the facts underlying his conviction in this Court.

application on July 25, 1962, on the affirmative votes of Messrs. Cotten, Leigh and DeBell, and two others.

On September 9, 1966, a federal grand jury sitting in the Eastern District of Virginia indicted Mr. Wechsler and his three partners for substantively violating and conspiring to violate the Travel Act. The "unlawful activity" alleged was the payment of $5,500 to Messrs. Cotten, Leigh and DeBell to secure their votes on the rezoning application. The indictment did not allege, nor did the government offer any evidence showing, that Mr. Wechsler or any of his partners travelled in or used any facility in interstate commerce to further the alleged offense. Instead, the sole basis for federal jurisdiction was the clearance of Mr. Cotten's $1,000 check through interstate banking channels two days after the Travel Act was enacted.

The substantive count charging Mr. Wechsler with violating the Travel Act was not permitted even to reach the jury. Mr. Wechsler was, however, convicted of conspiring to violate the Travel Act. In a split decision the Court of Appeals for the Fourth Circuit affirmed Mr. Wechsler's conviction, and this Court denied Mr. Wechsler's petition for a writ of *certiorari*. *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

On January 21, 1988, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), Mr. Wechsler petitioned the United States District Court for the Eastern District of Virginia for a writ of error *coram nobis* vacating his conviction. Mr. Wechsler argued that the clearance of Mr. Cotten's check through interstate banking channels had, at most, an incidental, minimal or fortuitous connection to the underlying state offense charged. Thus, under this Court's subsequent decision in *Rewis v. United States*, 401 U.S. 808 (1971) and its progeny, Mr. Wechsler ar-

gued there was no federal jurisdiction over the activity for which he was convicted.[2]

The District Court denied Mr. Wechsler's petition, stating that the United States Court of Appeals for the Fourth Circuit had rejected the jurisdictional argument Mr. Wechsler was making in *United States v. LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).[3] On appeal, the Fourth Circuit affirmed, stating that its decision in *United States v. LeFaivre*, *supra*, was dispositive. The Court of Appeals reiterated its position that even minimal or incidental interstate activity in connection with an unlawful scheme gives rise to Travel Ace jurisdiction. Appendix, p. 3a.

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[2] A writ of error *coram nobis* is the appropriate relief, because Mr. Wechsler has completed his sentence and *Rewis v. United States*, *supra*, constitutes a retroactive and dispositive change in the law, rendering the conduct for which Mr. Wechsler was convicted not criminal under the Travel Act. *See United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Travers*, 514 F.2d 1171, 1172-73 (2d Cir. 1974).

[3] Mr. Wechsler also challenged his conviction in the *coram nobis* proceeding on the basis that applying § 1952 to him violated the constitutional prohibition against *ex post facto* laws, but the district court rejected that challenge. Mr. Wechsler did not raise that issue before the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Fourth Circuit Court Of Appeals Conflicts With Prior Decisions Of Other Federal Courts Of Appeals.

The Fourth Circuit's decision is at odds with the decisions of seven Courts of Appeals and consistent with only one. The First,[4] Second,[5] Third,[6] Sixth,[7] Seventh,[8]

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[4] *United States v. Arruda*, 715 F.2d 671, 681-82 (1st Cir. 1983) (travel from New York to Boston to deliver $5,000 bribe was "an important link" in the scheme and not incidental); *United States v. Hathaway*, 534 F.2d 386, 398 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) (prearranged use of mails to forward checks in bribery/extortion scheme "was more than 'incidental' . . . for it was an important link in the [scheme]").

[5] *United States v. Herrera*, 584 F.2d 1137, 1146 (2d Cir. 1978) (continuous interstate travel and hundreds of interstate telephone calls "shows a knowing and intentional use of interstate commerce . . . which cannot be said to have been incidental or peripheral"); *United States v. Archer*, 486 F.2d 670, 682-83 (2d Cir. 1973) (one foreign telephone call in furtherance of bribery scheme is "a casual and incidental occurrence" and "a matter of happenstance").

[6] *United States v. Smith*, 789 F.2d 196, 204 (3d Cir. 1986) ("the nexus between the travel and the unlawful scheme may be so 'isolated, minimal, inconsequential, and nonessential' to the scheme that it is 'insufficient to establish jurisdiction under the Travel Act'"); *United States v. Wander*, 601 F.2d 1251, 1256 (3d Cir. 1979) ("in certain circumstances, 'the use of interstate facilities [will be] so minimal, incidental, and fortuitous, and so peripheral to the activities' of the defendants that conviction under [the Travel] Act will be barred").

[7] *United States v. O'Dell*, 671 F.2d 191, 194 (6th Cir. 1982) (the interstate transportation of newspapers containing advertisements for a prostitution ring is insufficient to establish Travel Act jurisdiction).

[8] *United States v. Muskovksy*, 863 F.2d 1319, 1327 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1345 (1989) (interstate activity "must relate significantly, rather than incidentally or minimally, to the illegal activity."); *United States v. Vanichromanee*, 742 F.2d 340, 349 (7th Cir. 1984) ("It is also clear that the interstate travel here was not 'fortuitous or isolated and incidental'"); *United*

Ninth [9] and Tenth [10] Circuits require a substantial and direct nexus between interstate activity and unlawful conduct violative of the Travel Act to confer federal jurisdiction over that conduct. Only the Fourth [11] and Fifth [12] Circuits find Travel Act jurisdiction where an

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States v. Raineri, 670 F.2d 702, 717 (7th Cir.), *cert. denied*, 459 U.S. 1035 (1982) ("In a Travel Act prosecution the interstate travel or use must relate significantly, rather than incidentally or minimally, to the illegal activity"); *United States v. Isaacs*, 493 F.2d 1124, 1146 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (clearance of three checks through interstate banking channels is "so minimal, incidental, and fortuitous, and so peripheral to the [defendants'] activities" that it was error to submit Travel Act counts to the jury); *United States v. Altobella*, 442 F.2d 310, 314-16 (7th Cir. 1971) (clearance of victim's check through interstate banking channels in furtherance of extortion scheme is minimal and incidental so that no federal crime was committed); *United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971) (advertisements seeking salesmen for gambling operation in Indianapolis newspapers that were distributed out-of-state insufficient for Travel Act jurisdiction).

[9] *United States v. Bagnariol*, 665 F.2d 877, 897-99 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) (interstate telephone call that was integrally connected to gambling enterprise was not incidental); *United States v. Ryan*, 548 F.2d 782, 786 (9th Cir. 1976), *cert. denied*, 429 U.S. 939 (1976) and 430 U.S. 965 (1977) (bribery scheme involving interstate travel by principals, interstate delivery of bribe and two interstate telephone calls "as a whole" had "substantial interstate connections").

[10] *United States v. Barbieri*, 614 F.2d 715, 718 (10th Cir. 1980) ("If the use of the interstate facility is incidental to the scheme, no federal crime is committed"); *United States v. Villano*, 529 F.2d 1046, 1052-54 (10th Cir.), *cert. denied*, 426 U.S. 953 (1976) (repeated use of interstate telephone facilities in furtherance of gambling operation is substantial enough to support Travel Act convictions).

[11] *United States v. Lozano*, 839 F.2d 1020, 1022 (4th Cir. 1988); *United States v. LeFaivre*, 507 F.2d 1288, 1296-97 (4th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

[12] *United States v. Pecora*, 693 F.2d 421, 424 (5th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

interstate act has merely an incidental, minimal or "happenstance" connection to the underlying criminal activity.[13]

The Courts of Appeals have expressly acknowledged this conflict. The Ninth Circuit has stated that:

> The view that the Travel Act does not encompass minimal or incidental use of interstate facilities is not held uniformly by the circuits. Although the Second and Seventh Circuits appear to have adopted such an interpretation, . . . the Fourth . . . Circuit [has] rejected it.

United States v. Bagnariol, 655 F.2d 877, 898 n.16 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) (citations omitted).[14] More recently, the Eleventh Circuit recognized that "The Second Circuit . . . held that such incidental contacts are insufficient under the Travel Act. The Fifth Circuit has held otherwise." *United States v. Smith*, 749 F.2d 1568, 1570 n.2 (11th Cir.), *cert. denied*, 471 U.S. 1137 (1985).

This sharp division between the circuits creates the untenable situation in which venue determines whether federal jurisdiction exists under the Travel Act. The very same conduct, if committed in the adjoining states of West Virginia and Ohio, has very disparate consequences, because West Virginia is within the Fourth Circuit and Ohio is within the Sixth Circuit. The incidental use of a check by any participant in one of the predicate crimes would make the West Virginia actor

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[13] The Eleventh Circuit has declined to reach this issue. *See United States v. Smith*, 749 F.2d 1568, 1570 n.2 (11th Cir.), *cert. denied*, 471 U.S. 1137 (1985). The Eighth and District of Columbia Circuits do not appear to have considered the issue.

[14] *United States v. Bagnariol* was decided before the Sixth Circuit reversed its position on this issue in *United States v. O'Dell*, *supra*. Thus, the *Bagnariol* opinion aligned the Sixth Circuit with the Fourth Circuit, an alignment which is no longer correct.

subject to federal jurisdiction and at risk of conviction of a federal felony, while the Ohio actor would, on the other hand, be subject only to state prosecution. Permitting the situs of the conduct to determine the existence of a federal crime not only undermines the uniform enforcement of federal criminal statutes, but also violates fundamental notions of fairness.

This uneven application of the Travel Act also upsets the delicate balance between federal and state law enforcement. Congress enacted the Travel Act to provide federal enforcement of racketeering enterprises that had become too large and powerful for individual states to combat. Testimony of Attorney General Robert F. Kennedy, S. Rep. No. 644, 87th Cong., 1st Sess., 2-3 (July 27, 1961). The Travel Act is a limited grant of federal jurisdiction made with deference to the general power of the states to police local crimes, such as prostitution, gambling, and bribery. Federal usurption of police power over local activity in one state, but not another, is an anomaly that ought not be allowed in our federal system of government.

The grant of *certiorari* will produce a uniform rule of decision which replaces the current, checkerboard pattern of federal law enforcement with a rule applicable in all the courts of appeals. It will also serve to protect the delicate balance between federal and state law enforcement.

II. The Fourth Circuit's Holding That Incidental Or Fortuitous Interstate Activity Supports Travel Act Jurisdiction Conflicts With This Court's Decision In *Rewis v. United States*, And The Consistent Application Of *Rewis* By The Courts Of Appeals.

The Travel Act was enacted on September 13, 1961, as part of a "comprehensive federal legislative effort to assist local authorities in dealing with organized criminal activity which, in many instances, had assumed in-

terstate proportions and which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce." *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (*citing* Hearings on S. 1653-7 and S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 10-11 (1961)) (citations omitted). Its official title is the "Interstate and foreign travel or transportation in aid of racketeering enterprises."

The Travel Act makes it a felony to, "travel[] in interstate or foreign commerce or use[] any facility in interstate or foreign commerce, including the mail, with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on," of specified types of "unlawful activity" and to thereafter commit an overt act in furtherance of that activity. 18 U.S.C. § 1952(a)(3). The statute defines "unlawful activity" to include gambling, prostitution, narcotics, arson, liquors on which the federal excise tax has not been paid, extortion and bribery—"crimes which historically have been the forte of organized crime." Letter from Attorney General Robert F. Kennedy to Representative Oren Harris (August 21, 1961), *reprinted in* 107 Cong. Rec. 15,542 (1961).

A. *The Fourth Circuit's Decision Conflicts With This Court's Decision In* Rewis v. United States.

Because Courts of Appeals differed on the extent and nature of the interstate activity required to give rise to Travel Act jurisdiction, this Court addressed the jurisdictional limits of the Travel Act in *Rewis v. United States*, 401 U.S. 808 (1971). The *Rewis* decision—decided four years after Mr. Wechsler's conviction—constitutes a rejection of precisely the overly broad construction of the Travel Act adopted by the Fourth Circuit.

In *Rewis*, the defendants were convicted of violating the Travel Act by operating a gambling establishment

located in Florida, but near the border with Georgia. Federal jurisdiction was asserted because two Georgia residents traveled from Georgia to Florida to patronize the gambling house. On appeal, the Fifth Circuit affirmed the operators' convictions on the theory that

> operators of the gambling establishment are responsible, under the terms of [the Travel Act], for the use of interstate facilities, by way of interstate travel, of those whose participation is vital to the success of his [sic] business.

Rewis v. United States, 418 F.2d 1218, 1222 (5th Cir. 1969).[15]

This Court reversed. Expressing profound concern about the delicate balance between federal and state law enforcement, the Court held that the interstate travel upon which jurisdiction was based—"a matter of happenstance"—was insufficient to transform a purely local offense into a federal felony. 401 U.S. at 812.

The *Rewis* opinion emphasized that the Travel Act must be applied consistently with its legislative history:

> [A]n expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to

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[15] The Georgia patrons were also convicted of violating the Travel Act. The Fifth Circuit, however, reversed their convictions, and explained: "Whether the reading of the federal statute be casual or intense, it appears that it is not aimed at making a federal crime out of a person's crossing a state line for the purpose of placing a bet, if the placing of such a bet is a crime in the state which he enters." *Rewis v. United States*, 418 F.2d at 1220.

> criminal activity solely because that activity is at times patronized by persons from another State. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of § 1952.

401 U.S. at 812.

The Travel Act's legislative history reveals that the Travel Act "was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811. This Court emphasized that Congress meant to provide federal prosecutors with a weapon to attack racketeering enterprises that had become too large and powerful for the individual states to combat. *Id.* at n. 6. This Congressional intent is apparent from the Senate testimony of the driving force behind the legislation, Attorney General Robert F. Kennedy, quoted at length in *Rewis*:

> We are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.
>
> Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill.
>
> * * * *
>
> The target clearly is organized crime. The travel that would be banned is travel "in furtherance of a business enterprise" which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. *Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.*

Id. (quoting S. Rep. No. 644, 87th Cong., 1st Sess., 2-3 (July 27, 1961)) (emphasis added).

As a final basis for rejecting the government's expansive interpretation of the jurisdictional element of the Travel Act, this Court cited the familiar rule that, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 401 U.S. at 812 (*citing Bell v. United States*, 349 U.S. 81, 83 (1955)).

This Court's decision in *Rewis* demonstrates that the Fourth Circuit's steadfast refusal to require a connection between the unlawful activity and the interstate activity—in the words of the Court of Appeals to "read into the statute any requirement that there be a substantial and integral involvement of interstate facilities with the illegal activity" (Appendix, p. 3a)—is erroneous. The fact pattern involved in *Wechsler* could not be more local or state oriented, and the interstate connection—the clearance of a single check through interstate banking channels—could not be more minimal, incidental or fortuitous. This was a one-time offense, not a large-scale, continuing and interstate criminal enterprise beyond the reach or competence of state law enforcement. It involved the zoning of real estate, a particularly local concern. Perhaps most importantly, the use of the interstate facility was utter happenstance resulting from a secretary's decision to deposit a check on one side of the Potomac River rather than the other. It was not, therefore, the type of activity intended to be prosecuted under the Travel Act:

> Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.

S. Rep. No. 644, 87th Cong., 1st Sess., 2-3 (July 27, 1961) (testimony of Attorney General Robert F. Kennedy).

B. *Application Of The Nexus Test Adopted By Other Courts Of Appeals Produces A Result Consistent With This Court's Decision In* Rewis v. United States.

In contrast to the Fourth Circuit's decision, and consistent with *Rewis* and its progeny,[16] most Courts of Appeals refuse to apply the Travel Act to local activity having only an incidental or minimal contact with a facility in interstate commerce. Instead, they require a substantial and direct connection between the interstate acts asserted as a jurisdictional predicate and the underlying unlawful activity—a "nexus."

The "nexus" test arises from the requirement of the plain language of the Travel Act that to come within the statute's ambit, a person must use a facility in interstate commerce "*with intent to* . . . promote, manage, establish, carry on, or facilitate . . . any unlawful activity." 18 U.S.C. § 1952(a)(3) (emphasis added). The requirement that the facility of interstate commerce be used with intent demonstrates that there must be a connection between the interstate act allegedly giving rise to federal jurisdiction and the underlying criminal activity. *See, e.g., United States v. Barbieri*, 614 F.2d at 717 ("By linking the interstate element to the prescribed activity with an intent requirement, Congress made it clear that there must be a coincidence between the purpose of the interstate activity and the prohibited objective."); *United States v. O'Dell*, 671 F.2d 191, 194 (6th Cir. 1982). Only if interstate travel or the use of a facility in interstate commerce has a substantial and direct, rather than a minimal, incidental or fortuitous, connection to the wrongful activity is jurisdiction under the Travel Act proper:

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[16] This Court has reaffirmed its holding in *Rewis* on several occasions. *See Perrin v. United States*, 444 U.S. 37, 50 (1979); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Erlenbaugh v. United States*, 409 U.S. at 247-48 at n.21.

> The determination whether federal jurisdiction under the Travel Act extends to cover given criminal activity depends on the facts of each individual case rather than a broad rule of law. If the nexus between a defendant's criminal activity and interstate travel or commerce becomes too tenuous or indirect, an application of the Act to that activity would be beyond the intent of Congress.

United States v. O'Dell, 671 F.2d at 193.

Application of the nexus test serves the overriding principle set forth in *Rewis*—to ensure, consistent with Congress' intent, that local crimes remain solely within the jurisdiction of the states. For example, in *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), the appellants were convicted of violating the Travel Act through an extortion scheme they conducted in Illinois. The appellants arranged for a woman to seduce an out-of-town businessman; took pictures of him in compromising positions; and demanded that he pay a ransom for the negatives. The only interstate activity charged was the clearing of the victim's check, drawn on a Philadelphia bank, through the mails. Mr. Justice Stevens, then a judge of the Seventh Circuit, declared that the convictions must be reversed:

> To warrant federal intervention we believe the [Travel Act] requires a more significant use of a facility of interstate commerce in aid of the defendants' unlawful activity than is reflected in this record.

Altobella, 442 F.2d at 314. *See also United States v. Isaacs*, 493 F.2d 1124, 1146 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (clearance through interstate banking channels of checks distributing proceeds of bribery scheme was "minimal, incidental and fortuitous" and did not support jurisdiction under the Travel Act).

Similarly, in *United States v. O'Dell*, *supra*, the Sixth Circuit refused to apply the Travel Act to a local crime

with an incidental interstate nexus. The defendants operated legal massage parlors in Louisville, Kentucky where illegal prostitution was also conducted. The defendants advertised the massage parlors in three local newspapers, some of which were distributed in Indiana. The government asserted federal jurisdiction under the Travel Act because of the interstate transportation of those newspapers. The Sixth Circuit vacated the convictions, holding that there was an insufficient nexus between the interstate travel of the advertisements and the prostitution ring:

> Any furtherance of prostitution, therefore, would be at most an indirect result of the happenstance that the Louisville papers were also distributed in Indiana. This connection with interstate commerce, we conclude, is too slim a basis for federal jurisdiction under the Travel Act.

671 F.2d at 194. *See also United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971) (advertisement seeking salesmen for gambling operation in Indianapolis newspapers that were distributed out-of-state did not give rise to jurisdiction under the Travel Act).

Conversely, when the interstate connection is substantial and directly related to the unlawful activity, application of the nexus test properly results in a finding of jurisdiction under the Travel Act. For example, in *United States v. Herrera*, 584 F.2d 1137 (2d Cir. 1978), New Jersey residents were convicted under the Travel Act for conducting a prostitution ring in New York. The interstate activity charged was the defendants' travel from their homes in New Jersey to their place of business in New York and numerous interstate telephone calls. The Second Circuit affirmed the defendants' convictions:

> The record here . . . discloses continuous interstate travel by the defendants from their homes in New Jersey to their prostitution operation in New York; several interstate calls by defendants related specifi-

> cally to the operation of their prostitution business; and hundreds of phone calls between the club in New York and each of the defendants' three condominiums in New Jersey over a period of several months.
>
> * * * * *
>
> *The case at hand shows a knowing and intentional use of interstate commerce by members of the conspiracy, which cannot be said to have been incidental or peripheral to this activity.*

584 F.2d at 1146 (emphasis added). *See also United States v. Wander*, 601 F.2d 1251, 1256-57 (3d Cir. 1979) (interstate telephone calls to entice co-conspirator to return from Florida to Pittsburgh and her interstate travel in furtherance of an extortion scheme are sufficient to confer federal jurisdiction).

Under the nexus test mandated by *Rewis*, Mr. Wechsler could not have been prosecuted, much less convicted, of conspiring to violate the Travel Act. The clearance of Mr. Cotten's check was not substantially and directly related to the charged bribery scheme. In both *Altobella* and *Isaacs*, almost identical conduct—the clearance of checks through interstate banking channels—was rejected as too incidental and minimal to support jurisdiction under the Travel Act. *United States v. Altobella*, *supra*; *United States v. Isaacs*, *supra*. Indeed, the Seventh Circuit in *Isaacs* flatly rejected the *Wechsler* decision, stating that:

> We are unable to argee with the [Fourth Circuit's] view of § 1952, however, not only because it assumes that the use of a single check crossing state lines may trigger § 1952, but also because it suggests that the check need not actually travel interstate. We cannot agree that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a § 1952 offense.

Isaacs, 493 F.2d at 1149 (citation omitted).

III. Uniform Application Of The Travel Act To Only Those Crimes Having A Direct And Substantial Interstate Connection Is Of Major Importance To Principles Of Federalism.

This petition poses an issue of substantial importance to our federal system of government. A delicate balance exists between powers reserved by the states and those delegated to and appropriately exercised by the federal government. As Justice Stevens wrote in *Altobella*, *supra*, "in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background." 442 F.2d at 316 (*quoting Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941)). *See also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 700 n.2 (1985) (Stevens J., dissenting); *Bennett v. New Jersey*, 470 U.S. 632, 655 n.16 (1985) (Stevens, J., dissenting). Nowhere is the federal-state relationship more sensitive than in the context of criminal law enforcement, a prerogative historically left to the states.

Because of these federalism concerns, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). There is no doubt that the unlawful conduct covered by the Travel Act—gambling, prostitution, bribery, extortion, and others—is precisely the type of conduct the states have traditionally regulated.

When it enacted the Travel Act, Congress was hesitant to encroach upon the states' power to regulate these crimes, yet concerned about the states' ability to police large and powerful organized crime groups. To limit the Travel Act's reach to organized crime and its equivalents, Congress imposed as a jurisdictional predicate to the Travel Act's applicability a requirement that there be

interstate acts in connection with the underlying criminal activity.

In *Rewis*, this Court held that an interstate act must be more than a "happenstance" to give rise to Travel Act jurisdiction; otherwise, the Travel Act would reach conduct Congress never intended to regulate and would upset the delicate balance between federal and state law enforcement. 401 U.S. at 812. Likewise, in *United States v. Bass*, *supra*, this Court reaffirmed *Rewis*, again emphasizing the importance of narrowly construing the Travel Act:

> As this Court emphasized . . . in *Rewis v. United States*, *supra*, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis*, we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." While we noted that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that "the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]."

404 U.S. at 349-50.

The Fourth and Fifth Circuit decisions rejecting the nexus test eviscerate the important limitation on Travel Act jurisdiction Congress intended and this Court has enforced. In the Fourth and Fifth Circuits the Travel Act has been expanded to provide that any state crime listed in § 1952(b) becomes a federal crime if any participant (or their secretary) uses a check or if there is

some other incidental or minimal interstate act. This construction of the Travel Act undermines the federalism concerns that guided Congress during its passage of the Travel Act:

> [Were] the § 1952 counts here to be upheld, the federal-state balance would be seriously upset. It would be the rare case where investigation of an enterprise in violation of state law would not disclose some incidental and fortuitous use of interstate facilities which might then be used to support a federal prosecution. Nothing in the legislative history [of the Travel Act] supports such a broad reading of the statute.

United States v. Isaacs, 493 F.2d at 1147.

Without this Court's decision, the parameters of federal and state sovereignty over local law enforcement will remain unsettled and disputed. *Certiorari* should be granted to resolve this substantial and important issue of federalism.

CONCLUSION

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated this 12th day of June, 1989.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-6034

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

NATHAN WECHSLER,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., Chief Judge. (MISC-88-1)

Argued: March 10, 1989 Decided: April 13, 1989

Before RUSSELL, Circuit Judge, BUTZNER, Senior Circuit Judge, and HARVEY, Chief Judge of the United States District Court for the District of Maryland, sitting by designation.

James Linwood Quarles, III (Jane E. Serene; Jude A. Curtis, HALE AND DORR on brief) for Appellant. William G. Otis, Assistant United States Attorney (Henry

E. Hudson, United States Attorney; Michael P. Socarras, Special Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Nathan Wechsler appeals the district court's denial of his petition for a writ of error *coram nobis* to vacate his 1967 conviction for conspiring to violate the Travel Act, 18 U.S.C. § 1952. We affirm the district court's judgment.

The indictment charged that Wechsler conspired to use facilities in interstate commerce "to establish and carry on and facilitate the establishment and carrying on of an unlawful activity by the bribery of officers of the State of Virginia in violation of the laws of the State of Virginia." Wechsler argues that the single interstate act alleged in the indictment, the clearance of a bribe check through interstate banking channels, was insufficient to support a Travel Act conviction. This argument was rejected by this court on Wechsler's direct appeal. United States v. Wechsler, 392 F.2d 344, 347 (4th Cir. 1968). Wechsler contends that the Supreme Court's subsequent interpretation of the Travel Act in Rewis v. United States, 401 U.S. 808 (1971), requires this court to reverse the district court's judgment and vacate his conviction.*

Wechsler's conviction was based on the following facts. In 1960, Wechsler and his business partners sought to procure a change in the zoning of some land in Fairfax County, Virginia. After filing an application for the rezoning with the county's board of supervisors, the partners arranged for attorney John C. Somers to assist them in the matter and placed a $5,500 check in escrow for

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* In *Rewis*, the Supreme Court held that "conducting a gambling operation, frequented by out-of-state bettors" does not, by itself, violate the Travel Act. 401 U.S. at 811.

Somers. After the board approved the desired zoning change, the partners released the $5,500 check to Somers, who deposited it into his own account and then wrote a check for the same amount to supervisor Clairborne Leigh. Leigh deposited the check into his account with a Virginia bank and wrote checks drawn on the account to himself and two other supervisors. One of the supervisors, Robert Cotten, deposited his check for $1,000 into his account with a Washington, D.C. bank. After the board's action was set aside in state judicial proceedings, the partners filed a new application and the board members who had been bribed again voted to grant it. *Wechsler*, 392 F.2d at 346, 347 n.3.

In denying the writ, the district court properly held that this case is governed by United States v. LeFaivre, 507 F.2d 1288 (4th Cir. 1974). In *LeFaivre*, we affirmed the Travel Act conviction of a defendant involved in a gambling operation located wholly within Maryland. The only interstate action was the deposit of 14 out-of-state checks from bettors. We held that this set of facts clearly fell within the language of the statute; by depositing the bettors' out-of-state checks, the defendant used a facility in interstate commerce to facilitate the operation of the gambling enterprise. For this reason, we distinguished *Rewis* and its progeny on which Wechsler relies. We declined to read into the statute any requirement that there be a substantial and integral involvement of interstate facilities with the illegal activity. We held that no such requirement is implicit in the statute or in the Supreme Court's interpretation of the Travel Act in *Rewis*. *LeFaivre* 507 F.2d at 1294-95. *See also* United States v. Lozano, 839 F.2d 1020, 1022 (4th Cir. 1988).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 4375-A

UNITED STATES OF AMERICA

v.

NATHAN WECHSLER,
Defendant.

ORDER

For the reasons stated from the bench, the court concludes that the subsequent interpretation of 18 U.S.C. § 1952 by the Supreme Court in *Rewis* v. *United States*, 401 U.S. 808 (1971), and the argument advanced by the defendant for vacating his conviction pursuant to that case, has been considered and rejected by the United States Court of Appeals for the Fourth Circuit in *United States* v. *LeFaivre*, 507 F.2d 1288 (4th Cir. 1974); c.f., *United States* v. *Santoni*, 585 F.2d 667 (4th Cir. 1978) (applying the *LeFaivre* rule to § 1951). The court further concludes, for the reasons stated from the bench, that the *ex post facto* argument advanced by the defendant was either considered and rejected by the court in the defendant's direct appeal, or is unpersuasive because it seeks to apply to the conspiracy conviction factors which would be determinative in a substantive count conviction. Accordingly, it is hereby

ORDERED petition of the defendant for a writ of error coram nobis is denied.

/s/ Albert V. Bryan
ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
May 6th, 1988

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Miscellaneous No. 88-01-M

UNITED STATES OF AMERICA

—vs—

NATHAN WECHSLER, *et al.*,
Defendant.

Friday, May 6, 1988
Alexandria, Virginia

Transcript of Petitioner's motion for Writ of Error Corum Nobis in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

For the United States:

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For the Defendant:

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—and—
DAVID M. DORSEN, ESQUIRE
Of: SACHS, GREENEBAUM & TAYLER
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

PROCEEDINGS

THE CLERK: Miscellaneous No. 88-1-A, United States versus Nathan Wechsler, et al.

MR. WILLIAMS: Justin Williams for the United States.

MR. BLANKINGSHIP: Good morning, Your Honor. Hugo Blankingship for the appellant, Nathan Wechsler.

Preliminarily, I'd like to introduce to this Court David M. Dorsen, who is a member of the Law Firm of Sachs, Greenebaum & Tayler in Washington, D. C. He is also a member of the D. C. Bar and New York State Bar. I move his admission for purposes of this hearing.

THE COURT: Motion granted. Delighted to have you with us.

MR. DORSEN: Thank you, Your Honor.

THE COURT: We'll hear your motion, and we have read your submission. We will hear you in elaboration on it.

MR. DORSEN: Thank you, Your Honor.

THE COURT: I wonder if we aren't going through an exercise to get you to the Fourth Circuit.

MR. DORSEN: Your Honor, I will try to be as candid as I can. I think that with respect to the statutory construction grounds, I believe that this is something that probably would have to go to the Fourth Circuit. I think that while, I think that in most circuits I would be successful or at least have a fair chance before a United States District Judge, in this Circuit, I believe the Court of Appeals had taken at least in general language the position that is inconsistent with the one that I am taking. I believe that this case in many ways is exactly the same as the Ruis Case (phonetic) in the Supreme Court in that in both the defendants caused, according to the jury verdict, activity in interstate commerce, and if the Court will recall in the Ruis Case, the Supreme Court held that there was no jurisdiction.

THE COURT: But the Fourth Circuit has considered Ruis and rejected your position, hasn't it?

MR. DORSEN: I think that's a fair statement, Your Honor, at least in general language that I would find it very difficult to argue to this Court, that I'm working on even remotely resembling a clean slate.

THE COURT: I just don't know that I have the leeway to vary from what it appears to me the Fourth Circuit has already decided, not only in the Lefavor Case (phonetic), but in the Santoni Case (phonetic) and in the Wechsler Case itself.

MR. DORSEN: I think that's probably accurate, Your Honor. As I said, I think in other circuits I would be willing to represent to the Court that the Court had an opportunity to reverse but I do not think that is probably true in the Fourth Circuit.

With respect to the ex post facto claim, Your Honor, I would like to—

THE COURT: (Interposing) Wasn't that discussed in the Wechsler Case?

MR. DORSEN: It was, Your Honor, but I think in a different form. I think that, I believe that articulated the way that we have articulated in our papers is that it's sufficiently different from the issues decided by the Fourth Circuit that I believe the Court has the opportunity, right and power to reverse.

Obviously if it does set aside the conviction, the Fourth Circuit undoubtedly will have an opportunity to hear it but I think Your Honor has that power, and I believe should exercise it.

Very briefly, Your Honor, in the Wechsler opinion, the Court focused on whether the criminal conspiracy that the jury found existed had been completed or was complete or whether events occurring after the payment of the money were part of the conspiracy that could be covered by the passage of the statute.

I believe that a more appropriate analysis is did Mr. Wechsler, a defendant in that case, do anything after the effective date of the statute that would subject him

to criminal liability. In other words, after the statute was passed—

THE COURT: (Interposing) Wasn't that the very issue that was presented by—

MR. DORSEN: (Interposing) I don't believe so, Your Honor. The Court never addressed that. The Court basically said that if any conspirator does any act in furtherance of the conspiracy after a statute is passed, every defendant in that conspiracy can be found guilty of the conspiracy charge.

I am making a somewhat different point, Your Honor. I am saying that each defendant must be shown to have done something himself to bring himself within that statute. In other words, the basic proposition of the ex post facto clause or due-process clause, depending on how it's articulated, is to put a person on notice that after a certain date if he does something, he is going to subject himself to criminal liability. It is uncontested, Your Honor, that after the passage of the statute on September 13, 1961, Mr. Wechsler did nothing, absolutely nothing nor caused anything to be done in furtherance of that conspiracy.

In other words, whatever he did and what the jury may have found he did a month or two earlier, he was finished himself. It is true he did not withdraw. We are not claiming he withdrew, but when somebody commits an act that is not criminal, enters into a criminal conspiracy, agreement, does something and then backs off and does nothing else and the statute is passed, in order to find him criminally liable, a Court has to find some obligation on him to withdraw. There is no obligation on him to withdraw, Your Honor.

The allegedly illegal agreement or the one that the jury found was entered into before the statute went into effect, he did nothing after the statute went into effect. He directed that nothing in the statute go into effect. The basic proposition of the ex post facto clause is that he

cannot be punished without notice that something you do is illegal.

I don't think there is anything in this record that could support a claim that after the statute went into effect, Mr. Wechsler, did anything, agreed, talked, wrote a letter, did anything. I think to punish someone, to send this man to jail on a two-year sentence on what happened is unconstitutional. The arguments made before the United States Court of Appeals for the Fourth Circuit were somewhat different. I think they were technical in the sense that they talked whether the crime was over on a particular day, but we are talking about fair notice, constitutional notice of a criminal statute.

THE COURT: Are you saying any more than if you had had the opportunity to argue it before the Fourth Circuit, you would have presented it in a different way?

MR. DORSEN: I am not sure, Your Honor, but I still think this man was convicted unconstitutionally. I ask the Court if it feels—I can understand the Court's position that a similar argument was made in the Fourth Circuit and rejected. I think this is a different argument. I would ask that the Court if it can see a way to consider it, as a constitutional argument, that subjected this man to a two-year criminal sentence that he served, to consider it in the light that I am presenting it. Maybe I am only saying, although I think I am saying a little bit more than I felt I could have made a better or different argument, certainly one that in retrospect, the one that was made was unsuccessful.

But I think in the interest of upholding the United States Constitution, this Court does have the power to take a different formulation of an argument and decide that there was an unconstitutional conviction in this case. I ask the Court to do that.

THE COURT: Mr. Williams, you want to be heard on the ex post facto aspect?

MR. WILLIAMS: Very, very briefly for a moment. It seems to me, Your Honor, that really what Mr. Dorsen

is doing is he would in effect have the Court rewrite or reconstrue the case law of conspiracy, and the case law as it stands is that if you are a member of a conspiracy, as the Fourth Circuit and the jury found Mr. Wechsler was in this particular situation, then you are guilty regardless of whether you perform any overt act as long as an overt act is performed by somebody and the conspiracy is in existence at the time after the particular statute, then everybody who is a member of that conspiracy is guilty.

As a matter of fact, counsel suggests well, why not have it so that to be a conspirator so as not to violate the ex post facto law, you yourself must perform an overt act in furtherance of the conspiracy after the date of a statute being enacted. That is just not the law, because an overt act can be noncriminal even in itself. So if he is a member of the conspiracy, which he was, it seems to me that is really the end of the—that is really the end of the matter.

MR. DORSEN: May I say something briefly in response, Your Honor?

THE COURT: Yes.

MR. DORSEN: Your Honor, the question of the statute of limitations where this normally comes up is one of statutory construction. Namely, did Congress intend to let somebody off the hook if another person did an act in furtherance of the conspiracy? In my view that has nothing to do with the fair in notice under the ex post facto law.

The other analogy that was used was Pinkerton, but the Supreme Court in Pinkerton specifically said that there was an unlawful agreement, and that an act done pursuant to the unlawful agreement made each person liable. At the time of the agreement that the jury found, there was no statute. It was not an unlawful agreement under Federal law. It is a very different situation.

As I said before, Your Honor, Mr. Wechsler was punished, severely punished for actions that he did before

the actions were illegal. And he did nothing afterward. When you look at this thing from the standpoint of notice, he was not on notice that he could be found guilty. The statute was passed. He did nothing after that. How can you be punished and sent to jail for two years when you did nothing after a statute made an act illegal?

The agreement was before the statute was passed, and Mr. Wechsler's participation as the jury found was before the statute was passed.

THE COURT: As counsel concedes, the question of the change in the interpretation of the Travel Act as applying to Mr. Wechsler's conviction, has been considered by the Fourth Circuit and rejected in the Lefavor and the Santoni Cases; and I think that certainly at this level resolves that aspect of the petitioner's argument.

Insofar as the ex post facto argument is concerned, I rather think that that was considered by the Court of Appeals in the Wechsler Case itself, and a different argument and perhaps a better argument is now being made, but it seems to me the argument is basically that this ought to be viewed as though it were a substantive offense as opposed to one for conspiracy.

I think the arguments are not effective for that reason. I think the conspiracy count and the conspiracy conviction overcomes what would, were it merely a substantive offense, be a valid argument.

For these reasons, the petition for writ of error will be denied. I will prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

CERTIFICATE OF OFFICIAL REPORTER

COMMONWEALTH OF VIRGINIA)
) ss.
CITY OF ALEXANDRIA)

I, EDWARD DONOVAN McCOY, Registered Professional Reporter and Official Court Reporter for the United States District Court for the Eastern District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I was authorized to report, and did so report in Stenotype, the foregoing proceedings;

THEREAFTER, my Stenotype notes were reduced to typewriting under my supervision; and I further certify that the pages herein numbered contain a true and correct transcription of my Stenotype notes taken herein.

DONE and signed, this ———— day of ————, 19—, in the City of Alexandria, Commonwealth of Virginia.

EDWARD DONOVAN McCOY, RPR
Official Court Reporter

* * * *

APPENDIX C

United States Code, Title 18:

"§ 1952 Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section, "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under Subchapter II of chapter 53 of title 31, United States Code, or under Section 1956 or 1957 of this title.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Supreme Court, U.S.
FILED
AUG 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2011

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDWARD S.G. DENNIS, JR.
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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his Travel Act conviction on the ground that the evidence did not show a sufficient nexus between his conduct and interstate commerce.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2011

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 873 F.2d 1441.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1989. The petition for a writ of certiorari was filed on June 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1967, petitioner was convicted of conspiracy to violate the Travel Act, in violation of 18 U.S.C. 1952. The court of appeals affirmed his conviction. 392 F.2d 344, cert. denied, 392 U.S. 932 (1968). In 1988, petitioner sought

a writ of error coram nobis in the United States District Court for the Eastern District of Virginia, requesting vacation of his conviction. The district court denied the application. The court of appeals affirmed. Pet. App. 1a-3a.

The evidence at trial showed that in March 1961 petitioner and his business partners bribed three members of the Fairfax County Board of Supervisors to obtain approval of a rezoning application for a tract of land in Fairfax County, Virginia. As part of the scheme, petitioner deposited $5,500 in bribe money into the Washington, D.C., bank account of an attorney who served as an intermediary. After the Board voted to approve petitioner's rezoning application, the attorney wrote a $5,500 check from the account to Supervisor Leigh, which Leigh deposited into his Virginia bank account. Leigh then shared the bribe money with Supervisors DeBell and Cotton. Cotton deposited into his District of Columbia bank a check for $1,000 drawn on Leigh's Virginia bank. The Virginia state courts subsequently set aside the Board's action on the rezoning application, but petitioner filed a second rezoning application, which was approved by the Board. The Board members who had been bribed voted in favor of the second application. Pet. App. 2a-3a.

The Travel Act, 18 U.S.C. 1952(a), prohibits "travel[] in interstate or foreign commerce or use[] [of] any facility in interstate or foreign commerce, including the mail, with intent to * * * distribute the proceeds of any unlawful activity; or * * * facilitate * * * any unlawful activity." The "unlawful activit[ies]" covered by the Act include "bribery." 18 U.S.C. 1952(b) (1982 & Supp. V 1987). At petitioner's trial, jurisdiction under the Travel Act was premised on the $1,000 check that was drawn on Leigh's Virginia bank and deposited into Cotton's bank in the District of Columbia. The court of appeals upheld peti-

tioner's conviction, holding that the transmittal of the bribery proceeds in interstate commerce was sufficient to establish jurisdiction. 392 F.2d at 347 n.3.

In 1988, after he had long since completed service of his sentence (and hence was ineligible for relief under 28 U.S.C. 2255), petitioner filed a petition for a writ of error coram nobis in the United States District Court for the Eastern District of Virginia, contending, among other things, that the passage of the check through interstate commerce was not sufficient to confer jurisdiction under the Travel Act. The district court declined to issue a writ of error coram nobis. Pet. App. 4a-5a.

The court of appeals affirmed. The court first noted that the argument that petitioner's conviction cannot be premised on the movement in interstate commerce of the check containing Cotton's bribe "was rejected by this court on [petitioner's] direct appeal." Pet. App. 2a. The court then rejected petitioner's argument that a different result is required by this Court's decision in *Rewis* v. *United States*, 401 U.S. 808 (1971), which held that the fact that some out-of-staters frequented a gambling establishment did not establish jurisdiction under the Travel Act. The court of appeals stated that neither the Travel Act nor *Rewis* requires "that there be a substantial and integral involvement of interstate facilities with the illegal activity." Pet. App. 3a.

ARGUMENT

As an initial matter, review is inappropriate because petitioner does not qualify for coram nobis relief. Petitioner is seeking to relitigate an issue he raised unsuccessfully on the direct appeal from his conviction. In *United States* v. *Morgan*, 346 U.S. 502, 506 (1954), this Court

emphasized that not all errors, but only those " 'of the most fundamental character,' " warrant coram nobis relief. 346 U.S. at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)). It stressed that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. at 511.[1] In accord with that standard, the Seventh Circuit in *United States* v. *Keane*, 852 F.2d 199 (1988), cert. denied, 109 S.Ct. 2109 (1989), held that coram nobis is not available to relitigate issues that were fully ventilated at the time of conviction. The court observed that at common law coram nobis review was limited to claims that were not apparent on the face of the record and therefore not raised at trial. Since coram nobis is not expressly authorized by any federal statute, but is instead available under the All Writs Act, 28 U.S.C. 1651, the court concluded that the common law rule ought to apply. Moreover, the court noted, coram nobis litigants, by definition, are not in custody, since coram nobis is available only when there is no other available remedy and persons in custody may seek relief under 28 U.S.C. 2254 and 2255. "The reason to bend the usual rules of finality is missing when liberty is not at stake," the court concluded. 852 F.2d at 203. It added that courts should focus their attention on the claims of persons who are in custody or have not yet had their claims reviewed. *Ibid.*

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[1] While he was a minor, the defendant in *Morgan* had pleaded guilty to a federal charge without waiving his right to counsel, which was an error under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The Court allowed him to reopen his federal conviction pursuant to a writ of error coram nobis after he was given a longer term as a second offender upon being convicted of a state offense.

Some courts have held that coram nobis is available to relitigate a claim where there has been an intervening change in the law that negates the presence of a crime. See *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974). But coram nobis relief is not available here under that rationale. Petitioner is incorrect in contending (Pet. 10-13) that, under *Rewis* v. *United States*, 401 U.S. 808 (1971), which was decided after his conviction had become final, his conduct is not prohibited by the Travel Act. Nothing in the language of the Travel Act prohibits the operation of an unlawful business that attracts some out-of-state customers, as in *Rewis*. However, the Act explicitly prohibits the use of interstate facilities to "distribute the proceeds of any unlawful activity" or to "facilitate * * * any unlawful activity," which is precisely what happened when petitioner's bribe to Supervisor Cotton was deposited in an out-of-state bank.[2]

Even if coram nobis relief were otherwise available, this case would not present an opportunity to resolve the conflict in the courts of appeals concerning the standard to be applied, in light of *Rewis*, in determining whether there is jurisdiction under the Travel Act. Most of the circuits have stated that the nexus between the interstate facility

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[2] Petitioner's reliance (Pet. 15-16) on *United States* v. *O'Dell*, 671 F.2d 191 (6th Cir. 1982), is misplaced. There, the court of appeals found no Travel Act violation where the operator of an illegal prostitution ring advertised his massage parlor business (which apparently fronted for the prostitution ring) in the local newspapers, some of which were sent outside the State. In reversing the defendant's conviction, the court emphasized that the defendant did not specifically urge the newspapers to carry his advertisements in its out-of-state editions, so the case was similar to *Rewis*, and the fact that the business attracted out-of-state customers could be said to be fortuitous.

and the illegal activity must be more than incidental, indirect, or minimal.[3] The Fourth and Fifth Circuits, on the other hand, have stated that an incidental connection between an interstate facility and an illegal activity suffices to bring that activity within the Travel Act.[4] But despite the dispute over the nature of the test to be applied, the courts of appeals all agree that the Travel Act has been violated where, as here, a participant in a bribery scheme uses interstate banking facilities to transmit payment in the form of a check to a bribed official. In *United States* v. *Peskin*, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976), which, like this case, involved a scheme to bribe state zoning officials to approve a zoning application, the court of appeals held that the use of interstate banking facilities to transmit bribery funds to the defendant was sufficient to constitute a Travel Act offense. 527 F.2d at 76-79. In three other cases, the Seventh Circuit has premised Travel Act jurisdiction on the interstate movement of checks. *United States* v. *Ranieri*, 670 F.2d 702, 717-718, cert. denied, 459 U.S. 1035 (1982); *United States* v. *Bursten*, 560 F.2d 779, 782-784 (1977); *United States* v. *Rauhoff*, 525 F.2d 1170, 1173-1175 (1975).[5] Similarly, in

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[3] See, *e.g.*, *United States* v. *Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988); *United States* v. *Smith*, 789 F.2d 196, 204 (3d Cir.), cert. denied, 479 U.S. 1017 (1986); *United States* v. *O'Dell*, 671 F.2d 191, 193 (6th Cir. 1982); *United States* v. *Bagnariol*, 665 F.2d 877, 898 n.16 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Barbieri*, 614 F.2d 715, 718 (10th Cir. 1980); *United States* v. *Hathaway*, 534 F.2d 386, 398 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Archer*, 486 F.2d 670, 682-683 (2d Cir. 1973).

[4] Pet. App. 3a; *United States* v. *LaFaivre*, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Pecora*, 693 F.2d 421, 424 (5th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

[5] In light the Seventh Circuit's repeated rulings that the Travel Act is violated by the use of interstate facilities to deposit checks for pay-

United States v. *Hathaway*, 534 F.2d 386, 397-398, cert. denied, 429 U.S. 819 (1976), the First Circuit held that the use of the mails to forward checks to the defendants in a bribery and extortion scheme fell squarely within the Travel Act. Thus, there is no conflict on the facts of this case.[6]

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ment to participants in illegal activity, petitioner's reliance (Pet. 15-18) on two earlier Seventh Circuit decisions, *United States* v. *Altobella*, 442 F.2d 310 (1971), and *United States* v. *Isaacs*, 493 F.2d 1124, cert. denied, 417 U.S. 976 (1974), is misplaced. Moreover, as the court explained in *Peskin* (527 F.2d at 77-78), those cases are distinguishable. In *Altobella*, the only tie to an interstate facility occurred when the victim of an extortion scheme gave an out-of-state check for $100 to the defendants, who preferred cash; that connection to interstate facilities was deemed minimal and fortuitous. The connection in *Isaacs* was even more so. There, checks were drawn in Illinois on an Illinois bank to distribute bribery proceeds to the defendants, who deposited the checks in Illinois banks. The court rejected the government's argument that jurisdiction could be premised on the fact that the checks were cleared through the Federal Reserve Bank in St. Louis, Missouri. 493 F.2d at 1146-1149. Here, in contrast, checks were used to supply the fund held by the intermediary who bribed the Board members and to distribute the proceeds among the Board members. The use of the fund held by the intermediary attorney and its subsequent distribution was central to the scheme and cannot be termed "fortuitous". Nor was it fortuitous that the checks moved from the District of Columbia to Virginia and (in the case of Cotton's bribe, which formed the jurisdictional basis for petitioner's conviction) back to the District.

[6] Petitioner also contends (Pet. 18-20) that the court of appeals' decision will upset federal-state relations in the field of law enforcement. Petitioner's argument, however, is just another way of restating his position that the Travel Act requires more than a minimal connection between interstate facilities and the illegal activity. As noted above, however, the use of interstate banking facilities to deposit a check representing payment to a bribed official falls within the Travel Act. Therefore, the decision below does not alter the balance set by Congress in enacting the Travel Act.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATHAN WECHSLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This brief is submitted in reply to the brief of the United States of America.

ARGUMENT

I. Coram Nobis Relief Is Appropriate.

A writ of error *coram nobis* is available under the All-Writs Act, 28 U.S.C. § 1651(a), to correct errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 512 (1954) (*quoting United States v. Mayer*, 235 U.S. 55 (1914)). *Coram nobis* is appropriate when an intervening change in the law renders non-

criminal the conduct for which a person was convicted.[1] *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

Mr. Wechsler does not, as the Government suggests, seek to relitigate issues he raised on direct appeal. He challenges his conviction on the basis that *Rewis v. United States*, 401 U.S. 808 (1971), renders the conduct for which he was convicted noncriminal. Mr. Wechsler could not have challenged his conviction based on *Rewis* during his direct appeal—*Rewis* was decided years after Mr. Wechsler's direct appeal was concluded.

Equally unavailing is the Government's argument that *coram nobis* is inappropriate here because *Rewis* did not limit the jurisdictional reach of the Travel Act, 18 U.S.C. 1952. As we demonstrate in our petition, seven Courts of Appeals have held otherwise. Pet. at 6-9. Those courts correctly read *Rewis* to hold that the Travel Act does not apply to conduct having only a minimal, incidental or fortuitous interstate connection. Indeed, the Government concedes that these decisions conflict with Fourth

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[1] The Government's reliance upon the Seventh Circuit's decision in *United States v. Keane*, 852 F.2d 199 (1988), *cert. denied*, 109 S. Ct. 2109 (1989), in an attempt to limit *coram nobis* is misplaced for two reasons. In *Keane* the Seventh Circuit based its holding on the petitioner's failure to demonstrate lingering collateral consequences from his conviction. 852 F.2d at 203-04. Mr. Wechsler, however, has never regained his right to vote or his professional licenses as an attorney and a C.P.A., which he lost as a result of his conviction. These collateral consequences are sufficient under both *Morgan* and *Keane*. *See United States v. Morgan*, 346 U.S. at 512-13; *United States v. Keane*, 852 F.2d at 203.

Moreover, *coram nobis* was denied in *Keane* because the indictment stated an offense after *McNally v. United States*, 483 U.S. 350 (1987), the change in the law upon which the petitioner relied. 852 F.2d at 204-06. In contrast, Mr. Wechsler's conviction was based upon interstate activity insufficient to confer Travel Act jurisdiction, so that the indictment of Mr. Wechsler could not possibly state a Travel Act offense.

and Fifth Circuit decisions adopting the narrow construction of *Rewis* the Government proposes. Opp. at 5-6.

II. The Conflict Among The Circuits On The Reach Of The Travel Act Extends To The Facts Of This Case.

Conceding a conflict among the circuits on the standard for determining Travel Act jurisdiction, the Government alleges that no conflict exists on the facts of this case. Opp. at 5-7. The Government argues that all circuits agree that any use of interstate banking facilities in a bribery scheme is sufficient to confer Travel Act jurisdiction. *Id.*

No such uniformity among the circuits exists. In each case the Government cites in support of its argument for expansive Travel Act jurisdiction, the use of interstate banking facilities was either essential to, or had a significant relationship to, the bribery scheme at issue, not the minimal, incidental or fortuitous interstate connection in this case. For example, in *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), a California corporation sent four checks drawn on its Michigan bank to its Illinois subsidiary to effectuate a bribe of Illinois public officials, and an officer of the parent travelled interstate in furtherance of the bribery scheme. The Seventh Circuit stressed that the California corporation had to somehow deliver the funds to Illinois and the use of checks was, therefore, essential to the California corporation's ability to bribe the Illinois officials.[2] 527 F.2d at 77.

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[2] The other cases cited by the Government likewise involve interstate activity of much greater magnitude than that involved in this case. *See United States v. Raineri*, 670 F.2d 702, 717-18 (7th Cir.), *cert. denied*, 459 U.S. 1035 (1982) (maintenance and regular use of an out-of-state bank account for expenses of a prostitution business has a significant relationship to the operation of the prostitution business); *United States v. Bursten*, 560 F.2d 779, 783-84 (7th Cir. 1977) (significant and essential use of Wisconsin

The jurisdictional predicate in this case for converting an offense which occurred entirely in Virginia into a federal felony could not be more minimal, incidental or fortuitous. The only interstate act was the deposit by a Virginia public official's secretary of a single check drawn on a Virginia bank in a District of Columbia bank two days after the Travel Act was enacted.[3] Unlike *Peskin* and the other cases cited by the Government, the clearance through interstate banking facilities of this check was neither essential to, nor significantly related to, this otherwise local offense.

The Government's attempt to distinguish two Seventh Circuit cases cited by Mr. Wechsler only highlights the conflict between the Fourth Circuit and other circuits. The first, *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971), is almost factually identical to this case. Both cases involve unlawful activity solely in one state, payment by check in that same state, and the fortuitous clearance of a single check across state lines. In *Alto-*

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bank account by Wisconsin businesses to bribe Indiana officials gives rise to Travel Act jurisdiction); *United States v. Rauhoff*, 525 F.2d 1170, 1175 (7th Cir. 1975) (nine checks drawn on Arkansas bank account to effectuate bribe of Illinois officials by Arkansas company were significant and essential to the unlawful scheme and conferred Travel Act jurisdiction); *United States v. Hathaway*, 534 F.2d 386, 398 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) (use of mails to forward several checks from Pennsylvania to Massachusetts and clearance of those checks from Massachusetts to Pennsylvania "was more than incidental, . . . for it was an important link in the interchange" in a bribing scheme).

[3] In its attempt to justify the sufficiency of the interstate connection in this case, the Government improperly considers checks other than Mr. Cotten's check, none of which cleared through interstate banking channels, and the interstate movement of Mr. Cotten's check, which the Government erroneously describes as from the District of Columbia to Virginia. Opp. at 6-7 & n.5. Each of those acts predated the enactment of the Travel Act and certainly cannot form the jurisdictional basis for application of the Travel Act.

bella, however, Justice Stevens, then a judge of the Seventh Circuit, held that such minimal and incidental interstate activity does not confer Travel Act jurisdiction. 442 F.2d at 315.

The other case the Government seeks to distinguish, *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), is no more factually distinguishable than *Altobella*. In *Isaacs*, the Seventh Circuit directly addressed the Fourth Circuit's decision on Mr. Wechsler's direct appeal, found the facts in *Isaacs* indistinguishable, and felt compelled to state that

> We are unable to agree with [the *Wechsler* court's] view of § 1952, however, not only because it assumes that the use of a single check crossing state lines may trigger § 1952, but also because it suggests that the check need not actually travel interstate. We cannot agree that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a § 1952 offense.

493 F.2d at 1149.

CONCLUSION

For the reasons discussed above, and in the petition, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated this 18th day of September, 1989.